

Studio B Posters (Louis)

From: tmarzouk@mptechlaw.com
Sent: Tuesday, April 19, 2022 11:10 AM
To: studio.b@neohio.twcbc.com
Subject: Chris Fallows - Studio B, Inc.: Copyright Infringement
Attachments: Fallows - Studio B Letter 19April2022.pdf; Ex. 1 - Fallows Copyright Reg. VA 1-876-736.pdf;
Ex. 2 - Fallows - Studio B Comparison.pdf

ATTENTION: E. Louis Petit

Dear Mr. Petit:

Please see attached correspondence and accompanying exhibits with respect to the above-referenced matter.

Thank you,

Tobey B. Marzouk,
Legal Counsel to Chris Fallows

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April 19, 2022

Via Electronic Mail

E. Louis Petit
Studio B, Inc.
3177 Stanley Road
Fairlawn, OH 44333

and

262 S Cleveland Massillon Road
Copley, OH 44321

Email address: studio.b@neohio.twcbc.com

Re: Chris Fallows – Studio B, Inc.: Copyright Infringement

Dear Mr. Petit:

We are writing this letter as copyright litigation counsel on behalf of our client, the photographer Chris Fallows (“Mr. Fallows”). Studio B, Inc. (“Studio B”) has created, sold, and distributed a poster that displays a copy of a photograph subject to a registered copyright owned by Mr. Fallows.

Our records indicate that Studio B never obtained a license to use Mr. Fallows’ copyright-protected photo. We have been retained by Mr. Fallows with respect to this copyright infringement and are writing Studio B so that this matter receives the proper attention.

1. Chris Fallows and the Fallows Shark Photo

Mr. Fallows is a well-known South African photographer of sharks and other marine wildlife, whose works can be found at www.apexpredators.com. Mr. Fallows is the author and owner of the iconic “Great White Shark” photograph, featured at <https://www.chrisfallows.com/ocean/> (hereinafter, the “Fallows Shark Photo”). This shark photograph was first published on July 30, 2001 and is registered with the United States Copyright Office, Copyright Registration No. VA 1-876736, Application Title 6951-22 (see attached Exhibit 1, Copyright Registration and Deposit).

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The Fallows Shark Photo has been featured in National Geographic as among the “Ten Photos of Great White Sharks to Take Your Breath Away.” The National Geographic article states:

The sight of a great white in full hunting mode is for most people a sight that elicits greater response than any other shark image. Photographing a massive adult exploding from the water, jaws agape, is a display of this super shark’s full predatory prowess – and anyone lucky enough to capture the moment on camera has landed a dream photograph.

Chris [Fallows] recalls a day in June 2001 when he crouched, cramped intently behind his camera, waiting endlessly for a split second of explosive shark action. In an instant the huge shark above popped like a Polaris missile from the water, and in that same moment vaulted into wildlife photographic history. To this day and several thousand breaches later, we have yet to see anything that matches the [Mr. Fallows’ “Great White Shark”] photo

2. Copyright Infringement Claim

a. The Infringing Merchandise

Mr. Fallows recently discovered that Studio B created and has printed, displayed, advertised, distributed and sold various merchandise – including a poster, a blanket and likely other products – that features a shark image essentially identical to the Fallows Shark Photo (the “Studio B Image”). See Exhibit 2, bottom right image. The following ecommerce sites, including the Walmart and Amazon sites, offer for sale products that display the Studio B Image and infringe the Fallows Shark Photo:

- <https://studiob.cameoez.com/Scripts/PublicSite/> (includes Studio B copyright notice on the poster itself; SKU B452 – “Shark Breach”)
- <https://www.walmart.com/ip/Shark-Breach-Non-Flocked-Blacklight-Poster-24-5-x-36-5-Laminated/524304023>
- <https://www.amazon.com/Shark-Breach-Non-Flocked-Blacklight-Poster/dp/B093VVHGCH?th=1>
- https://www.allposters.com/-sp/SharkBreach-Non-FlockedBlacklight-Posters_i16173040_.htm?sOrigID=7975&upi=F9MN740
- <https://www.blackballcorp.com/Shark-Breach-non-flocked-blacklight-poster-24x36.aspx>

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- <https://siliconvalleytextiles.com/product/shark/>

All merchandise displaying the Studio B Image copies and appropriates without a valid license the Fallows Shark Photo.

b. Actual Copying

We are attaching as Exhibit 2 a comparison that shows clear evidence of infringement. At the top of the exhibit is the Fallows Shark Photo. At the bottom, on the left, is the shark in the Fallows Shark Photo with the orientation changed to be the same as in the copy of the shark in the Studio B Image, and, on the right, is the Studio B Image.

The comparison clearly shows that the Studio B designer had access to and made a literal, exact copy of the Fallows Shark Photo and the proceeded to create the derivative work displayed in the Studio B Image. All of the spatial relationships and relative distances are identical in both photos. For example, the relative locations of the snout, eyes, mouth, teeth, and fins are exactly the same in both images. In addition, innumerable details in both shark images are identical, including the teeth, patterns on the skin, and, even the location and size of numerous water droplets and patterns created by the water splashing against the skin of the shark. The inescapable conclusion is that the Studio B had access to and copied – without a valid license – the Fallows Shark Photo.

c. Copying of the Expressive Elements Protected by Copyright

Not only is the Studio B Image an actual, direct copy of the Fallows Shark Photo, but the expressive elements of the original photograph – all protected by the Fallows copyright – were copied by Studio B. The case law is clear that copyright law protects not the idea of a wildlife specimen, but the expressive elements – specifically, the “pose, posture and facial expression” – of a particular wildlife specimen. *See Art Line, Inc. v. Universal Design Collections, Inc.*, 966 F.Supp. 737, 741 (N.D. Ill. 1997) (protectable elements of an animal image are the pose, posture and facial expression); *see also Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508 (7th Cir. 1994); *Ty, Inc. v. Gma Accessories, Inc.*, 959 F.Supp. 936, 941, 943 (N.D. Ill. 1997).

The primary and dominant elements of the “pose, posture and facial expression” of the Fallows Shark Photo are copied by the Studio B Image. All of the core expressive elements in the Fallows Shark Photo appear in the Studio B Image, including the pose and posture of the head, body, and fins of the shark image in the Fallows photo that convey “explosive shark action” and “the huge shark popp[ing] like a Polaris missile from the water.” In addition, the shark’s facial expression, including the gaping mouth and the string of exposed, threatening teeth, is the same in both images. Each of these expressive elements, protected by the copyright

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in the Fallows Shark Photo, are the same in both images. Moreover, the Studio B Image even copies detailed patterns in the water. Simply put, the Studio B Image copies the core expressive elements of the Mr. Fallows' photo that make this an iconic image of a shark thrusting out of the water.

d. The Studio B Image is an Unauthorized Derivative Work

We acknowledge that Studio B created a derivative work by cropping the original work, changing the orientation and making other trivial changes. The designer of the Studio B image, however, left the original photograph's shark largely unchanged. Both innumerable details, which proves access and copying, and the expressive elements protected by copyright law are copied by the Studio B Image. Because Studio B was not authorized to create the derivative work, the distribution, sales, and display of the Studio B Image constitutes copyright infringement.

3. License Fee and Resolution

Our client is not unreasonable and has asked that we make a good faith effort to open a dialogue with Studio B and attempt to resolve this matter without resorting to litigation. The minimum assessment for infringement of the Fallows Shark Photo is a retroactive license fee of **\$25,250**. The settlement amount will be higher, however, depending on the sales and profits generated by the merchandise displaying the Studio B Image. Please note that the copyright registration entitles Mr. Fallows to actual damages or statutory damages of up to \$150,000 per work for willful infringement. Furthermore, Mr. Fallows fully expects to recover his attorney's fees, which no doubt will be awarded given the clear evidence of copying.

To resolve this matter we request that Studio B provide, on a confidential basis, the following information (worldwide) for the merchandise displaying the Fallows Shark Photo: (i) for each product line, the number of units created; (ii) for each product line, the number of units sold directly to end-consumers by Studio B and the number of units sold to any resellers or distributors, (iii) for each product line, the number of units, if any, in inventory; (iv) for each product line, the cost of goods; and (v) for each product line, the sales revenue generated by direct sales to end-consumers by Studio B and the sales revenue generated by sales to any resellers and distributors, including all royalty, commission and other such amounts.

4. Conclusion

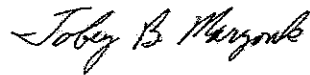
The fee for acquiring the retroactive license and release, we believe, is substantially less than what would be paid as damages if an infringement action must be pursued. Indeed, the cost of a settlement would be a fraction of the anticipated attorneys' fees that would be incurred in any infringement action. The determination of a reasonable settlement amount, however, cannot proceed until the requested information is provided.

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We request that you confirm receipt of this correspondence and provide an estimate of the time required for your initial response. Mr. Fallows would appreciate it if such confirmation of receipt and time estimate could be provided by **Friday, April 29, 2022**.

Thank you.

Very truly yours,

A handwritten signature in black ink that reads "Tobey B. Marzouk". The signature is written in a cursive, flowing style.

Tobey B. Marzouk
tmarzouk@mptechlaw.com

Enclosures: Exhibits 1 and 2

Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Maria A. Pallante

Register of Copyrights, United States of America

Registration Number
VA 1-876-736

Effective date of
registration:
May 28, 2013

Title

Title of Work: 6951-22

Completion/Publication

Year of Completion: 2001

Date of 1st Publication: July 30, 2001

Nation of 1st Publication: United States

Author

■ Author: Christopher Fallows

Author Created: photograph(s)

Work made for hire: No

Citizen of: South Africa

Domiciled in: South Africa

Year Born: 1972

Copyright claimant

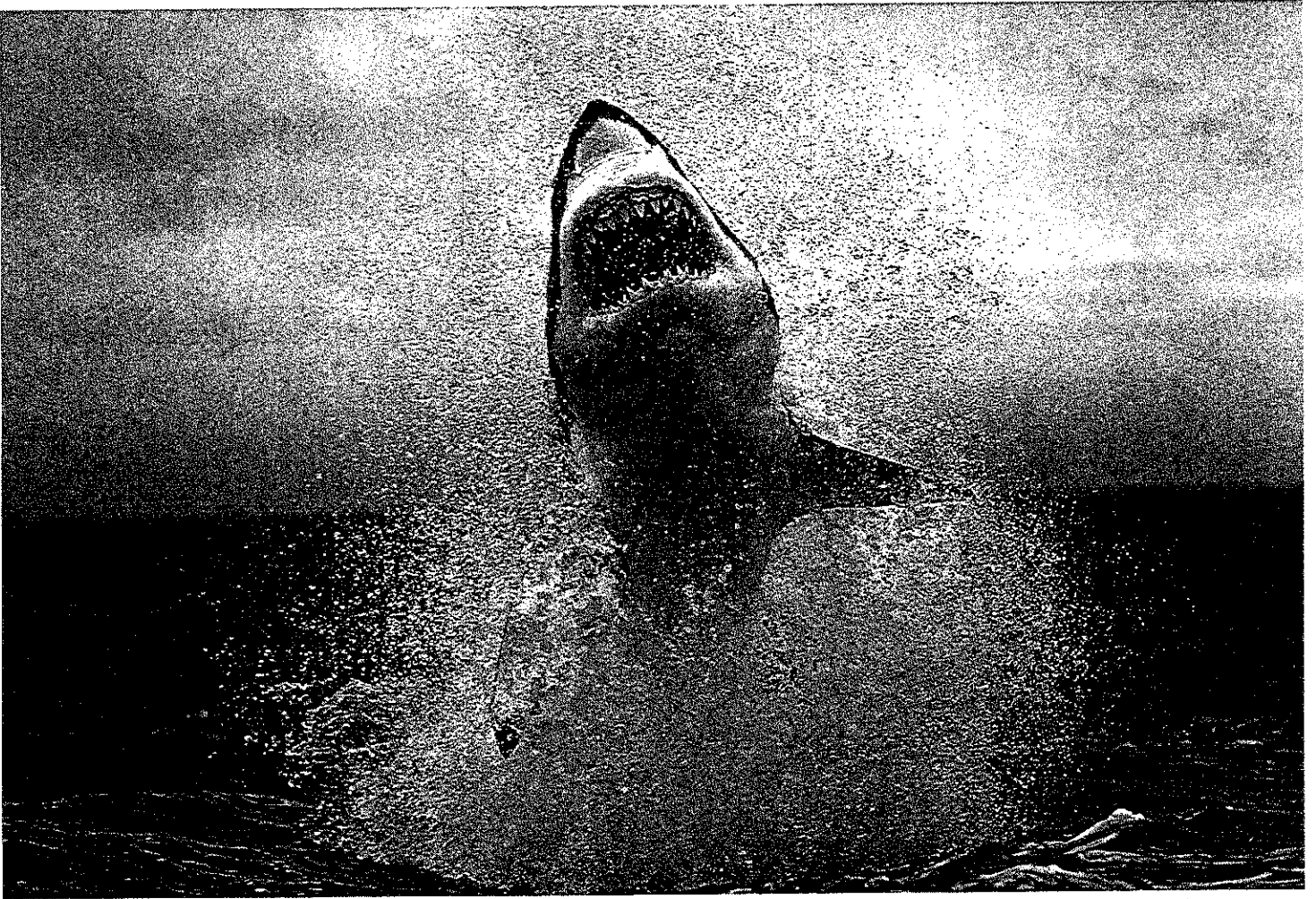
Copyright Claimant: Christopher Fallows

14 Thibault Walk, Marina Da Gama, Cape Town, 7945, South Africa

Certification

Name: Christopher Fallows

Date: May 28, 2013



Christopher Fallows No. 6951-22

